No. 79-1640

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

James F. Schad 613 Corporation
and Juliette Ann DiLuciano,
Petitioners,

v.

Borough of Mount Ephraim,
Respondent.

ON APPEAL FROM THE
SUPREME COURT OF NEW JERSEY

BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE

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INTEREST OF AMICI

Morality In Media, Inc. as Amicus Curiae, files this brief in this case

which is before this honorable Court on the merits, under the provisions of Rule 36.2.

Morality in Media, Inc., is a New York not for profit inter-faith charitable Corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates in seven states. It corresponds eight times a year with over 30,000 recipients of its newsletter located in every state of the United States. Its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The President of Morality in Media,

Inc., is Reverend Morton A. Hill, S.J. In 1968 Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography".[1]

Morality in Media files this brief supporting the position of the Borough of Mount Ephraim because it believes that the decision in this matter will have a significant impact upon the quality of life in small suburban and rural communities throughout the United States.*

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1. The "Hill-Link Minority Report" was cited by this honorable Court in Kaplan v. California, 413 U.S. 115, at 120 n.4 (1973); Paris Adult Theatre I. v. Slaton, 413 U.S. 49, at 59 n.7 and n.8 (1973).

*/Both parties are forwarding letters consenting to the filing of this brief directly to the Clerk.

SUMMARY OF ARGUMENT

I.

Amicus initially argues that the police power is the constitutional source for the ordinance - that this power is a broad one in the Zoning Area and extends to many values deserving of protection including family values, youth values, morals and the prevention of neighborhood deterioration, all of which affect the "Quality of Life" in the community. It then goes on to show that certain types of exclusionary zoning have been upheld by this Court and that many courts have held that not all commercial uses need be accommodated in a community if the ones accommodated at locations within the community are reasonably related to the immediate needs of its inhabitants, are not arbitrary, and the other important

needs of the residents can be accommodated in the neighboring communities or areas, viz., the so called "Community at Large". Amicus opines that the appellant should have the burden of proving that these other needs are not substantially met in that Community at Large. Finally, Amicus points out that the trier of the fact has determined at the trial level that the ordinance is a valid exercise of the police power.

II.

Amicus further contends that the restraint here is a content neutral time, place, and manner restraint. As such, it does not violate the First Amendment. While at first blush the ordinance does not appear to deal with time, place, and manner, the effect is such when we examine its restrictions in relation to

the "Community at Large". Amicus concludes that under such circumstances the rationale of Young v. American Mini Theatres is dispositive of arguments based on infringement of First Amendment rights.

ARGUMENT

I.

THE ORDINANCE OF THE BOROUGH OF MOUNT EPHRAIM IS A REASONABLE AND CONSTITUTIONAL EXERCISE OF THE POLICE POWER.

A. The police power is the constitutional source for Mount Ephraim's Zoning Ordinance Section 99-15B.

Zoning ordinances, to be valid,

> "Must find their justification in some aspect of the police power, asserted for the public welfare."[2]

B. The police power utilizing zoning is broad; it includes various values summed up in the phrase "Quality of Life".

The concept of the police power is broad. As Justice Powell has noted:

> "One-half century ago this Court broadly sustained the

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2. Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

> power of local municipalities to utilize the then relatively novel concept of land-use regulation in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens."[3]

The United States Supreme Court has often noted the broad reach of the police power:

> "An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts...
> "Public safety, public health, morality, peace and quiet, law and order - these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it...
> "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as

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3. Young v. American Mini Theatres, 427 U.S. 50, 73 (1976), concurring opinion of Justice Powell.

carefully patrolled."[4]

It has also noted that the police power

> "Is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[5]

An additional rationale for the application of the police power was given in the concurring opinion of Justice Powell in Young v. American Mini Theatres[6]:

> "The purpose of preventing the deterioration of commercial neighborhoods was certainly within the concept of the public welfare that defines the limits of the police power."

In addition, Justice Stevens stated for the majority in Young v. American

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4. Berman v. Parker, 348 U.S. 26, 32-33 (1954).
5. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).
6. 427 U.S. 50, 75 (1976).

Mini Theatres[7]:

> "The city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."

In Agins v. City of Tiburon,[8] this Court, in upholding a residential zoning restriction challenged as an unconstitutional taking in violation of the Fifth and Fourteenth Amendments said:

> "The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill-effects of urbanization. Such governmental purposes long have been recognized as legitimate."

Finally, in Euclid v. Ambler Realty Co.,[9] the Court made the following comments on the right of the community

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7. 427 U.S. 50, 71 (1976).
8. ___ U.S. __, 65 L.Ed. 2d 106, 112 (1980).
9. 272 U.S. 365, 386-387 (1926).

to preserve its own character:

> "With the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities."

C. Certain types of exclusionary zoning have been upheld previously by the Supreme Court.

In Euclid v. Ambler Realty Co., supra, a zoning ordinance was upheld by the United States Supreme Court which excluded from certain zones all industrial establishments. The Court said

> "The exclusion is in general terms of all industrial establishments...The restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures...
> "[Euclid's] governing authorities, presumably representing a majority of its

> inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines."[10]

D. Many courts have held that not all commercial uses need be accommodated at localities within the community if the ones accommodated are reasonably related to the immediate needs of the inhabitants and other needs may be accessible in the "community at large."

In Valley View Village v. Proffet,[11] the Sixth Circuit upheld a single use type zoning ordinance, saying:

> "Traditional concepts of zoning envision a municipality as a self-contained community with its own residential, business and industrial areas. It is obvious that Valley View, Ohio, on the periphery of a

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10. 272 U.S. 365, 388-389 (1926).
11. 221 F.2d 412, 418 (6th Cir. 1955).

> large metropolitan center, is not such a self-contained community, but only an adventitious fragment of the economic and social whole. We cannot conclude as a matter of law that an ordinance which places all of the area of such a village into a residential district is per se arbitrary and unreasonable, with no substantial relation to the public health, safety, morals or general welfare. It would appear contrary to the very purposes of municipal planning to require a village such as Valley View to designate some of its area for business or industrial purposes without regard to the public need for business or industrial uses. The council of such a village should not be required to shut its eyes to the pattern of community life beyond the borders of the village itself. We think it is not clearly arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character, so long as the business and industrial needs of its inhabitants are supplied by other accessible areas in the community at large."

Similarly, in McDermott v. Village

of Calverton Park,[12] a zoning ordinance was challenged which did not (with minor exceptions) provide for commercial uses and limited the use of land to one-family dwellings. The Court noted:

> "There can be no doubt that the desired rezoning would not benefit any resident of the village except plaintiff. This for the reason that the services likely to be offered in the proposed shopping center are already available a short distance away."

In Reynolds v. Barrett,[13] the court had before it a zoning ordinance of a primarily residential community. In ruling that the ordinance was generally valid, the court said that the City of Piedmont

> "Is entirely surrounded by the City of Oakland in which

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12. 454 S.W.2d 577, 583 (Mo. 1970).
13. 12 Cal. 2d 244, 249 (1938).

> are located many business houses which maintain frequent and adequate delivery service to all parts of Piedmont... The people of the City of Piedmont have shown a determined effort to keep their city a residential city. This they have the legal right within constitutional limits, to do."

Finally, in Cadoux v. Planning & Zoning Commission, [14] the Connecticut Supreme Court upheld a zoning ordinance limiting land use to residential and farming uses throughout the municipality. The Court said:

> "The town of Weston is on the periphery of other larger metropolitan centers."

The situation of the Borough of Mount Ephraim is similar to these cases in which the challenge to the exclusionary zoning ordinances of small communities

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14. 162 Conn. 425, 429, cert. denied 408 U.S. 924 (1972).

were challenged. Mount Ephraim is a community of limited size.[15] Nothing indicates that live entertainment of the type respondents seek to bring in is not available in a neighboring location. Mount Ephraim could exclude all commercial uses but has chosen to exclude only certain uses. It has chosen to be less exclusive than the ordinances upheld above.

Valley View and Belle Terre tell us that Mount Ephraim has the right under its police power to preserve its residential character so long as the business and industrial needs of its inhabitants are supplied by other

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15. The Court could and should take judicial notice of the New Jersey statute (1926 N.J. Laws Chapter 82), setting forth the boundaries of Mount Ephraim; cf. Lamar v. Micou, 114 U.S. 218, 223 (1885).

accessible areas in the community at large.

E. The trial court found that Mount Ephraim's zoning ordinance was a reasonable exercise of the zoning power.

Judge Deighan, in the trial de novo in the Camden County Court, found that the ordinance was a reasonable exercise of the police power:

> "There has been no distinction without reason by the Municipality and ... the permitted uses under the Zoning Ordinance is a reasonable exercise of police power and ... the Zoning Ordinance is not directed to any infringement on the constitutionally protected rights. Live entertainment is simply not a permitted use in any establishment...."[16]

The cases establish that the rule of reasonableness is applied to land-use restrictions:

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16. Petitioner's Brief for Certiorari, Appendix, 12a.

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control... The reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[17]

Examination of the uses permitted by Section 99-15B of the ordinance shows that these uses are reasonably related to the normal needs of the inhabitants of the Borough of Mount Ephraim and that their delimitation is not arbitrary. The ordinance satisfies the Borough's needs while protecting its residents "from the

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17. Euclid v. Ambler Realty Co., 272 U.S.365, 388, 395(1926); see also Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

ill-effects of urbanization," to use this Court's phrase in Agins, supra.

F. Conclusion

The Borough of Mount Ephraim, in permitting only certain uses, has acted with due regard to the public needs and with due regard for the lack of public need for permitting the location of uses not permitted within its limited boundaries. The burden of proof that these needs are not met in surrounding communities should be on the appellant. Zoning Ordinance Section 99-15B represents a legitimate exercise of the zoning power.

II.

THE BOROUGH OF MOUNT EPHRAIM ZONING ORDINANCE IS A TIME, PLACE, AND MANNER RESTRICTION.

It is also submitted that Mount Ephraim's zoning ordinance is a content-neutral, time, place, manner restriction

as was approved by the Court in Police Department of Chicago v. Mosley,[18] in the context of a picketing ordinance. As such, it does not violate the Equal Protection Clause of the Fourteenth Amendment. Although the Mosley ordinance was struck down, the Court made the following comment on valid time, place, and manner restrictions:

> "We have continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests."

The Mosley Court has specified, however, that such restrictions must be content-neutral:

> "But, above all else, the First Amendment means that government has no power to

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18. 408 U.S. 92, 98 (1972).

> restrict expression because of its message, its ideas, its subject matter, or its content... Our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control..."[19]

The Mount Ephraim Zoning Ordinance, Section 99-15B, is obviously from its wording part of an overall planned commercial land-use scheme. As such, it is

> "Not directed to the control of specific land uses because of their potentiality for offense or harm, but toward the location of land uses within the community regardless of their lack of nuisance proclivities, based upon the needs and character of the community."[20]

The Borough of Mount Ephraim does not discriminate on the basis of the

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19. 408 U.S. 92, 95-96 (1972).
20. A.H. Rathkopf, 2 The Law of Zoning and Planning, Para. 17.02 [3] (4th ed. 1980).

content of speech. It is directed to land-use in a community of limited size.

Young v. American Mini Theatres[21] is directly applicable to the situation. Substitute the "Community at Large" concept for the City of Detroit and "Live Nude Dancing" for "Adult Bookstore" and one can readily say with Mr. Justice Stevens that

> "There is no claim that the distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained."

The Young Court also points out that the protection of such activities is less important to society than the protection afforded speech generally:

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21. 427 U.S. 50, 62 (1976).

> "What is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited."[22]

Justice Powell In Young summarizes his position by saying:

> "I view the case as presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent."[23]

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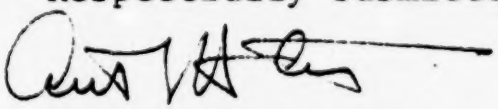
22. 427 U.S. 50, 70-71 (1976).
23. 427 U.S. 50, 73 (1976).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed. The Borough of Mount Ephraim Zoning Ordinance Section 99-15B is a valid exercise of the police power which does not violate the First Amendment.

DATED: December 29, 1980

Respectfully submitted,



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